

MONTANA PUBLIC DEFENDER COMMISSION  
**LEGISLATIVE COMMITTEE MEETING**

Helena Regional Office and Conference Call  
139 N. Last Chance Gulch, Helena MT 59601

**March 27, 2014**

**DRAFT MINUTES**

**Committee Members Present**

Fritz Gillespie, (Chair), Helena; Ann Sherwood, Pablo; Roy Brown, Billings

**Committee Members Absent**

Brian Gallik, Bozeman; Majel Russell, Billings

**Agency Team Members Present**

Bill Hooks, Chief Public Defender; Harry Freebourn, Administrative Director; Wade Zolynski, Chief Appellate Defender; Wendy Johnson, Contract Manager; Carleen Green, Accountant

**Interested Parties**

Adrienne Slaughter, Department of Corrections; Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana

**1. Call to Order**

Committee Chair Fritz Gillespie called the meeting of the Legislative Committee to order at 10:05 a.m.

**2. Approval of Minutes (\*Action Item)**

- A. March 10, 2014
- B. August 8, 2012
- C. March 12, 2012

Commissioner Sherwood moved to approve the minutes of the March 12, 2012; August 8, 2012; and March 10, 2014 Legislative Committee meetings as drafted. Chairman Gillespie seconded and the motion carried.

**3. Legislative Proposals for 2015 Session (\*Action Item)**

*Suspend Payment of Public Defender Fees during Periods of Incarceration*

It is labor intensive to track these collections which are often only a few cents per client per month. OPD collects less than \$3,000 per year for hundreds of transactions. Adrienne Slaughter from the Department of Corrections (DOC) was asked to comment from their point of view. Ms. Slaughter said that their only concern is that the payment suspension not impact the client's financial stability when they reenter the community upon release from prison. Chairman Gillespie said that the legislation could require a determination regarding the ability to pay upon release. He will give the DOC an opportunity to review the draft legislation for input before presenting it to the Law and Justice Interim Committee for their support.

Commissioner Sherwood asked if this is intended to apply to county jail incarcerations as well (e.g. people sitting out misdemeanor sentences). The DOC doesn't currently collect from those people. However, Chairman Gillespie does intend that it apply to people who are under a DOC commitment and are in a county jail awaiting placement. This item will advance to the full Commission.

*Replace State Special Revenue with General Fund*

This proposal would relieve OPD from accounting for and reporting on state special revenue funds related to public defender fees. As discussed at the October 18, 2013 meeting, it has become virtually impossible to get the information needed from the courts to account for individual payments. The state special revenue fund would remain in existence to receive grants or other unusual funding sources, but all public defender fees would go directly into the general fund.

The agency would request a one-time appropriation to the general fund in the same amount that would have been requested for state special revenue, for a net zero fiscal impact. This amount would then become part of the base. Commissioners Brown and Sherwood joined Chairman Gillespie in supporting the proposal and it will advance to the full Commission.

*Define Household in the Eligibility Determination Statute*

There is currently some confusion regarding which household members should be included when making the eligibility determination. Adding a definition to Title 47 would clarify what constitutes a household and create more uniformity in making determinations.

The definition OPD currently uses is in 15-30-2337 and it excludes "bona fide lessees, tenants, or roomers and boarders on contract." OPD has interpreted this to include roommates, but Chief Zolynski reads it differently and thinks the roommate exclusion should be specifically included in any new definition developed in Title 47. The committee agreed to move forward in developing a proposed definition.

*Amend 47-1-111 (3) to Modify the Definition of Indigence*

Current statute allows applicants to qualify for public defender services if they meet either the income guideline or the hardship test. The eligibility specialist does not pursue verification of assets if the applicant meets the income guideline, only if qualifying under the hardship test. Chief Zolynski would like to see the language changed to disqualify applicants who have no income but substantial assets. Mr. Freebourn said that it might require additional staff resources to qualify every applicant based on both tests, although the fiscal impact might be offset in part by disqualifying more applicants and reducing the caseload. Chairman Gillespie advocated for eligibility specialists doing this as their full-time and only job. This item will advance to the full Commission.

Chairman Gillespie invited public comment on any item discussed so far, and throughout the remainder of the meeting at any time. No comments were offered.

*Amend 47-1-111 to Allow RDPD Involvement in Eligibility Determination*

This was a performance audit issue because OPD practice is that the Regional Deputy Public Defender (RDPD) files motions to rescind appointments and appears in court if necessary when an applicant is determined to be ineligible for public defender services. In addition, the

RDPD assists the eligibility specialist as needed in making hardship determinations; they are in the best position to know the impact of the charges and the rates charged by private attorneys in their region. The audit opinion is that this violates 47-1-111 (6) (e) which prohibits individual public defenders from performing eligibility screening.

The original intent of this section may have been to take the individuality out of the eligibility determination process to the extent possible and to prevent conflict situations. The solution may be to prohibit “assistant” public defenders from doing eligibility screening. This proposal will advance.

#### *Clarify the Court’s Consideration of the Eligibility Process*

Chief Hooks would like to clarify Title 47 and create more uniformity in how courts rule on motions to rescind appointments. His proposal would require the court to hold a hearing, and to grant the motion to rescind if the client chooses not to participate in the hearing. He would also like to refine the process by which the judge would grant the motion in a contested rescission. Commissioner Sherwood asked if there is a process for individual clients to object to the motion to rescind. The client doesn’t need to file a motion, but just needs to write to the judge or request a hearing. In addition, the Commission on Courts of Limited Jurisdiction is working on forms that would facilitate clients asking for a hearing on motions to rescind. Chief Zolynski has also developed a form to send to people who don’t qualify that they can use to contest the determination. Commissioner Sherwood is satisfied that we aren’t creating more impediments for the client and the proposal will advance.

#### *Allow Flat Fee Contracts*

This bill failed in the last session. The proposal is not to return to a system where unlimited cases are awarded to a low bidder, creating a financial disincentive to work cases, but to allow fixed-fee contracts in non-adversarial forums such as treatment courts. It would create cost certainty in some courts and would be expected to generate cost savings.

The committee supports going forward again in the next session. Commissioner Brown suggested that improved timing, by getting it on the schedule earlier rather than later, could bring success. Communicating with the legislative leadership and making sure the bill gets to the right committee in both houses will also improve the chance of passage.

#### *Remove Jail Time for Certain Misdemeanors and Modify the Definition of Contempt*

The bill to remove jail time also failed last session after making it through the first house easily. There are a number of misdemeanors where jail remains a possibility but is almost never imposed, and removing jail as a possible punishment removes the obligation to represent clients at public expense. This would result in a cost savings by reducing the number of misdemeanor cases.

Some county attorneys and lower courts opposed the bill in the last session because they thought it would result in an inability to impose further punishment on clients who were convicted but failed to pay the costs imposed, and would reduce the defendant’s motivation to make payments. Amending Title 46 to make it clear that the courts have punitive authority including jail time under the contempt provisions could alleviate those objections.

Chief Hooks and Chief Zolynski have some reservations about these proposals. Although they show that the agency is doing what it can to reduce caseloads, many clients who might be unaware of the potential consequences of a conviction would benefit from having a public defender even if there is no possibility of jail time. In addition, the recent Supreme Court decision in the Christ case may prohibit OPD from providing representation in a contempt proceeding. Chairman Gillespie suggested that 46-8-115 could be amended in a way that at least makes it clear that a person charged with contempt is entitled to counsel.

Niki Zupanic said that the ACLU initially supported the jail time removal bill because they favor eliminating jail time whenever possible. But they also have concerns that there are consequences stemming from a misdemeanor conviction, even if there is no jail time included. She is encouraged by the possibility of clarifying the contempt provisions to add in due process, but is not sure that it will be enough for them to support it again next session.

Commissioner Sherwood agreed that people need to be aware of the potential for collateral consequences, whether that information is provided by the courts or by pro bono or public defender attorneys. Chairman Gillespie said that 46-8-101 (3) may need to be amended to remove the provision that a public defender may not be assigned if the court waives incarceration as a sentencing option at the initial appearance. Both proposals will advance.

#### *Concealed Weapons for Investigators*

During the last session, the OPD investigators found a sponsor for this legislation to allow them to carry a concealed weapon on the job if they have a valid concealed weapon permit. The bill was intended to ensure the safety of the investigators doing field work in often remote locations. Eventually the bill far exceeded the intended scope and it died in committee. The proposal is for OPD to present it as an agency bill this session.

Commissioner Brown suggested that it would be beneficial to find out how the bill would be received if it was put forth again, and how the expansion from the intended purpose could be prevented. The proposal will advance.

#### *Meeting Stipend for Commissioners*

The consensus at the February 24 Commission meeting was that the commission members are not interested in reinstating the \$50 per meeting stipend and that it could be better spent on OPD operations. The recommendation to the full Commission will be not to pursue this proposal.

#### **4. Public Comment**

There was no additional public comment.

#### **5. Adjourn**

The meeting adjourned at 12:10 p.m.